No. 05-348

2005

IN THE

Supreme Court of the United States

SAMANTHA J. COMFORT, ET AL.,
Petitioners,

v.

LYNN SCHOOL COMMITTEE, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the First Circuit correctly applied settled law, including the Court's decision in Grutter v. Bollinger, 539 U.S. 306 (2003), in determining that: (a) the City of Lynn, Massachusetts has a compelling interest in its race-conscious (not race-preferential) plan, which guarantees all students, regardless of race, the right to attend their neighborhood school, and integrates its schools only by using voluntary, noncompetitive transfers to educationally comparable schools; and (b) Lynn's Plan is narrowly tailored to achieve its compelling interest in producing the significant educational benefits of integration and protecting its students from the harms of racial isolation and segregation, is review by this Court appropriate?

2. Where the First Circuit's decision does not conflict with decisions of other circuits and agrees with the two other Courts of Appeals' decisions involving similar educational contexts and interests decided after the Court's decision in Grutter, is review by this Court appropriate?

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the *en banc* Court of Appeals for the First Circuit (Pet. App. 1-50) is reported at 418 F.3d 1 (1st Cir. 2005).[1] The United States District Court's decision (Pet. App. 98-220) is reported at 283 F.Supp.2d 328 (D. Mass. 2003).

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on June 16, 2005. The petition for a writ of certiorari in No. 05-348 was filed on September 14, 2005. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (2000).

[1] "Pet. App." refers to the appendix to the Petition in No. 05-348.

STATEMENT OF THE CASE

1. Lynn is an urban school system with over 15,000 students attending twenty-five schools. It has eighteen elementary schools, four middle schools, and three high schools. All Lynn's schools provide comparable educational quality, resources, and curriculum and are equally successful in providing an education to Lynn's students. At the time of trial in June 2002, 42% of Lynn's students were white and 58% nonwhite--29% Hispanic, 15% African-American, and 14% Asian-American.

In 1987, Lynn adopted a voluntary plan to integrate its schools. Lynn's Plan gives every parent the ability to send his or her child, regardless of race, to that child's neighborhood school. Approximately two-thirds of students' parents make that choice. A student's race is considered and used as a decisive factor only when Lynn is approving parents' voluntary requests for school transfers, and only then in certain circumstances. Lynn applies the same school assignment rules to all its students, whether white or nonwhite. Lynn's race-conscious plan regulates only requests for non-competitive, elective school transfers to non-neighborhood schools that have a segregative effect on Lynn's schools and students, i.e., when the transfer would exacerbate "racial isolation" or "racial imbalance," as defined by the Plan, in a particular school.[2] Whenever a school's racial composition falls within +/- 15% for elementary or within +/- 10% for middle and

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[2] The Plan defines a "racially isolated" elementary school, for example, as one where the percentage of minority students in the school falls more than 15% below the school district's overall minority composition and a "racially imbalanced" elementary school as one where the percentage of minority students is more than 15% above the school district's overall minority composition in that school year. Pet. App. 7-8, 126-27.

high schools of the district's overall racial composition, there are no limits on transfers for that school ("neutral transfers"). For example, since 1992, the Plan's transfer restrictions have been applicable only to Lynn's elementary and middle schools. Lynn's three high schools have remained integrated without the transfer restrictions. Moreover, before race is used in a transfer decision, Lynn accounts for a number of individualized, race-neutral factors, including a student's place of residence, school attendance zones, a sibling's school assignment, whether a "neutral transfer" applies, class size, space availability, and the student's language or special education needs. Parents can appeal transfer denials. A small number of segregative transfer appeals are made each school year. Appeals are approved when parents document a significant health, safety, or other hardship from denial of the requested transfer. Roughly 50% of appeals are successful. Pet. App. 6-8, 28-29, 101, 125-32; Stipulations, ¶¶ 6-9, 15-16, 23-31, 55-58.

2. Lynn first adopted its Plan in 1987 when its *de facto* segregated school system was deeply troubled. In the Lynn school district, which was 26% nonwhite in 1987, most of its schools were overwhelmingly white, with many over 90% white. Nonwhite students were concentrated in four of its eighteen elementary schools and one middle school. Lynn's schools were also beset with (a) racial strife and interracial violence between its white and nonwhite students, (b) poor academic performance, (c) low attendance rates, (d) high rates of discipline, and (e) low community confidence in the school system. Lynn also experienced significant white flight, with white enrollment declining by an average of 5% each year for the ten years preceding the Plan. Compared to Lynn's predominantly white schools, schools with high minority student concentrations had significantly inferior educational conditions. As expert testimony established, racial isolation, segregation, and racially identifiable schools (schools with racial makeups

significantly different from the overall racial composition of a school district) were the essential factors in generating Lynn's myriad education, school safety, and race relations problems.[3] To counteract these dire conditions and provide the benefits of an integrated education, Lynn adopted its Plan. Pet. App. 5-6, 19, 102-03, 119-25, 138-39, 175.

3. Today, by all measures, Lynn's school system is thriving. In a district with a high percentage of minority and low-income students,[4] Lynn has achieved significant educational and academic achievement gains throughout its school system, most particularly for students attending schools in Lynn's urban center. It has improved students' motivation to learn and learning outcomes. Schools have uniformly high attendance rates and declining suspension rates, with extraordinarily low levels of student conflict, crime, and violence. Race relations among students are very positive. Students are much more prepared to succeed in racially diverse colleges and workplaces and live in racially diverse communities. Lynn schools no longer have a problem with white flight. Pet. App. 9, 19-22, 27, 103, 134-36, 175-76, 219. Expert testimony established that Lynn's integration plan was essential to generating these significant improvements in education, school safety, and race relations since the Plan was adopted. Pet. App. 19-22, 27, 29-31, 103, 134-45, 175-77, 181-85.

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[3] When adopting its Plan, Lynn identified eliminating racial isolation as a primary goal to reduce the conflicts and violence between its white and nonwhite students and to enable it to achieve all the hoped-for educational improvements. See Ex. A-J, Lynn's Plans; Stipulations, ¶ 124.

[4] Minorities constituted 58% of the overall student population in the 2001-02 school year, compared with only 26% in the 1987-88 school year; 65% of students' families lived at or near the poverty level in the 2001-2002 school year. Pet. App. 6, 122, 131-32.

4. Following an eleven-day bench trial, the District Court issued its opinion concluding that the Lynn and state defendants provided overwhelming evidentiary support establishing Lynn's compelling educational, school safety, and race relations needs for its school integration plan. The District Court also held that the Plan was narrowly tailored to achieve Lynn's compelling goals. Pet. App.10, 18, 174-203.

On appeal, a three-judge panel of the First Circuit Court of Appeals concluded that "defendants have made a persuasive case that a public school system has a compelling interest in obtaining the educational benefits that flow from a racially diverse student body." Pet. App. 76. The panel held, however, that Lynn's Plan was not narrowly tailored. Pet. App. 11, 86. The First Circuit withdrew the panel decision. 2004 WL 2348405 (1st Cir. Oct. 20, 2004), withdrawn, (Nov. 24, 2004); Pet. App. 96-97.

In June 2005, the First Circuit issued its *en banc* opinion, holding that Lynn's Plan met constitutional requirements. Pet. App. 15-34. The *en banc* First Circuit Court, relying on Grutter v. Bollinger, unanimously held that Lynn had a compelling interest in obtaining the substantial educational benefits that flow from its school integration plan. Pet. App. 19-22. Except for one ground, the five members of the *en banc* court also unanimously agreed that Lynn's integration plan was narrowly tailored. The two dissenting judges stated that Lynn erred by using race as a decisive factor in some school transfer decisions, rather than as "a strong but non-determinative 'plus' factor for integrative transfers."[5] Pet. App. 50. The *en banc* court, relying on

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[5] The two dissenting judges were members of the original three-judge panel. Pet. App. 46, 51. Petitioners not only rely heavily on the withdrawn panel decision for arguments in their petition, Pet. Br. 22, 25-28, but petitioners also fail to note that after rebriefing and reargument to the *en banc* court, the judges dissented on only

Grutter, concluded that individualized consideration of each student is unnecessary in this educational context. Taking into account the context and compelling interests advanced here, the court stated that "(t)he concerns motivating the individualized consideration requirement in a competitive, race-preferential admissions context . . . are simply not present in a non-competitive K-12 transfer policy aimed at racial diversity." Pet. App. 25.

ARGUMENT

I. THE COURT SHOULD NOT GRANT REVIEW BECAUSE THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS OR THIS COURT.

The First Circuit's decision here does not conflict with any decision of this Court or any other Court of Appeals. Petitioners' argument to the contrary is flawed for three reasons: (1) it relies on cases involving significantly different contexts and interests from those presented here; (2) it relies on decisions preceding Grutter v. Bollinger, where the courts followed the limited constitutional guidance of school desegregation cases and Regents of University of California v. Bakke, 438 U.S. 265 (1978); and (3) it relies on two withdrawn First and Ninth Circuit Court panel decisions.[6]

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one ground, rather than the four grounds in the panel decision. Pet. App. 46-50, 86.

[6] The First Circuit's panel decision here was withdrawn. 2004 WL 2348505 (1st Cir. Oct. 20, 2004), withdrawn, (Nov. 24, 2004); Pet. App.96-97. Similarly, the Ninth Circuit's panel decision was withdrawn after a petition for rehearing *en banc* was granted. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 377 F.3d 949 (9th Cir. 2004), reh'g *en banc* granted, 395 F.3d 1168 (9th Cir. 2005). The Ninth Circuit recently reversed in substance

Three circuit courts since Grutter (the First, Sixth, and Ninth Circuits) have addressed K-12 integration policies involving similar contexts and interests and have decided the constitutional questions consistently. These circuits have recognized the compelling interest in integration in K-12 schools and have identified similar considerations that must be taken into account in a narrow tailoring inquiry in the K-12 context under the Equal Protection Clause of the Fourteenth Amendment. For example, in Parents Involved in Community Schools v. Seattle School District No. 1, No. 01-35450, 2005 WL 2679585 (9th Cir. Oct. 20, 2005), the *en banc* Ninth Circuit recently upheld the constitutionality of Seattle, Washington's voluntary integration plan for high school assignments. Similarly, the Sixth Circuit affirmed the constitutionality of Louisville, Kentucky's race-conscious, K-12 school assignment policy for educationally comparable schools in McFarland v. Jefferson County Public Schools, 330 F.Supp.2d 834 (W.D. Ky. 2004), aff'd, 416 F.3d 513 (6th Cir. 2005) (*per curiam*), reh'g and reh'g *en banc* denied (Oct. 21, 2005). Moreover, the Second Circuit, in Brewer v. West Irondequoit Central School District, 212 F.3d 738, 749, 752-53 (2nd Cir. 2000), which preceded Grutter, also concluded that educators have a compelling educational interest in reducing racial isolation in K-12 schools through race-conscious means.

Neither of the Ninth Circuit's decisions that petitioners rely upon, Smith v. University of Washington, 392 F.3d 367 (9th Cir. 2004), cert. denied, 126 S.Ct. 334 (Oct. 3, 2005), and Doe v. Kamehameha Schools, 416 F.3d 1025 (9th Cir. 2005), establishes a conflict within the federal circuits. They concern entirely distinct contexts, facts, and interests from those applicable here. Smith involved a competitive, race-preferential

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the panel decision, No. 01-35450, 2005 WL 2679585 (9th Cir. Oct. 20, 2005) (*en banc*).

admissions program to a state law school. Doe involved a race-preferential admissions policy to a private school that required the exclusive admission of students of native Hawaiian ancestry. Another case petitioners cite, Cavalier v. Caddo Parish School Board, 403 F.3d 246 (5th Cir. Mar. 1, 2005), as amended on denial of reh'g and reh'g *en banc* (Mar. 29, 2005), is also inapposite. Cavalier concerned a school district's mistaken reliance on an expired 1981 court desegregation decree to justify its race-preferential magnet schools admissions program.

Moreover, in important ways, cases like Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999), cert. dismissed, 529 U.S. 1050 (2000), Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999), cert. denied, 529 U.S. 1019 (2000), and Cavalier arise in contexts distinct from this case. Each of those cases involved the distribution of a discrete, limited governmental benefit. Tuttle involved admission to kindergarten in a special alternative school; Eisenberg, transfer to a special math and science magnet school; Cavalier, transfer to a special magnet school. These cases may require a different legal analysis from Lynn's noncompetitive, race-conscious transfer policy to educationally comparable non-neighborhood schools. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204-10 (1995) (government contract procurement); Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989) (same); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 270-73 (1986) (teacher employment).

The petitioners cannot establish a conflict among circuit courts. Moreover, since circuit courts are still in the process of resolving the question of the constitutional significance of the differences between the higher education and the K-12 contexts in applying the Grutter Court's narrow tailoring requirements, granting review here would be premature.

II. THE FIRST CIRCUIT'S DECISION PROPERLY APPLIED SETTLED LAW TO LYNN'S K-12 EDUCATIONAL CONTEXT.

A. The First Circuit Correctly Applied Grutter v. Bollinger in Concluding that Lynn Has a Compelling Interest in Racially Integrating its K-12 Schools.

The *en banc* First Circuit Court correctly relied on Grutter v. Bollinger in unanimously holding that Lynn had a compelling governmental interest in racially integrating its elementary and secondary schools. Pet. App. 17-22. The court found that the interests Lynn advances in this K-12 educational context "bear a strong familial resemblance" to many of the educational interests the Grutter Court found compelling for higher education.[7] Pet. App. 21. The First Circuit also found that the benefits that flow from the racial integration of Lynn's schools are distinct from those in higher education and are even more compelling in the K-12 educational context. Pet. App. 18-22. The court cited the overwhelming evidence establishing the positive impact racial integration has on student safety and attendance, which are important and distinctly different educational interests from those that institutions of higher education advance for promoting racial diversity.

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[7] The Court in Grutter v. Bollinger cited findings that "the Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races." 539 U.S. at 330. The Grutter Court further relied on the "numerous studies show[ing] that student body diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." Id. (internal citations omitted). The First Circuit concluded that Lynn students receive these same benefits when educated in Lynn's racially integrated K-12 schools. Pet. App. 21-22, 22 n.8.

Pet. App. 22. The court also found that racial isolation and segregation can adversely affect school attendance and academic performance of minority students in K-12 schools and that "these effects can be combated by racial integration." Pet. App. 19. The First Circuit concluded that Lynn's Plan not only improved educational opportunities for all students but also generated "higher attendance rates, declining suspension rates, a safer environment, and improved standardized test scores -- since the Plan's inception." Pet. App. 19. At trial, petitioners "concede[d] the importance of these goals." Pet. App. 176.

The Grutter Court did not recognize only viewpoint diversity or "true educational diversity" as a compelling interest, as Petitioners argue, Pet. Br. 12; rather, the Grutter Court also recognized racial diversity in public education as a compelling interest. As the First Circuit correctly concluded, Grutter is not "limited to the benefits that flow from viewpoint diversity in the higher education context" but "extend[s] to the benefits that flow from racial diversity in the K-12 context" (emphasis in original). Pet. App. 21. The First Circuit emphasized that the differences in compelling interests between higher education in Grutter and K-12 schools here are the "logical result of context." Pet. App. 22. Although petitioners are correct that Grutter relied in substantial part on the First Amendment's right to "academic freedom" and the "educational autonomy" of institutions of higher learning, they fail to recognize that this Court also rooted its decision in government's constitutional interest in promoting racial diversity in public education. 539 U.S. at 327-33, 338. Grutter relied heavily on landmark decisions involving elementary and secondary school education, stating that this Court has long recognized, since Brown v. Board of Education, 347 U.S. 483, 493 (1954), the government's powerful interest in promoting racial diversity in the K-12 setting. Grutter, 539 U.S. at 331 (citing Plyler v. Doe,

457 U.S. 202, 221 (1982)).

The Grutter Court concluded that attaining a racially diverse student body is essential for the University of Michigan Law School to achieve its proper institutional mission, 539 U.S. at 328; similarly, the First Circuit concluded that the benefits from racially integrating its schools are central to Lynn's achievement of its proper educational mission.[8] Pet. App. 19-22, 27.

B. The First Circuit's Narrow Tailoring Analysis is a Factually-Driven Application of Settled Law.

Consistent with the Grutter Court's admonition that the very purpose of strict scrutiny is to take relevant differences in the context and interests advanced into account, Grutter, 539 U.S. 306, 336 (2003), the First Circuit engaged in a rigorous, context-specific narrow tailoring inquiry. Pet. App. 22-34.

1. The First Circuit correctly applied Grutter's teachings in holding that the Court's narrow tailoring requirements for competitive, race-preferential higher education admissions programs do not prohibit Lynn

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[8] The petitioners mischaracterize the record and the First Circuit's opinion by arguing that Lynn uses its Plan to address societal discrimination and to provide students with role models from the same race. Pet. Br. 16. As the parties stipulated at trial:

> The government interests identified by Lynn in its Plan include fostering integrated public schools and what Lynn believes are [their] positive effects; reducing minority isolation and avoiding segregation and what Lynn believes are their negative effects; promoting a positive racial climate at schools and a safe and healthy school environment; fostering a cohesive and tolerant community in Lynn; promoting diversity; ensuring equal educational and life opportunities and increasing the quality of education for all students.

Pet. App. 18; Stipulations, ¶ 126.

from using race as a decisive factor in school-transfer decisions. Pet. App. 22-27. As the court held, "[i]f a non-competitive voluntary student transfer plan is otherwise narrowly tailored, individualized consideration of each student is unnecessary." Pet. App. 27. "The concerns motivating the individualized consideration requirement in a competitive, race-preferential admissions context that focuses on diversity along a number of axes (e.g., the Gratz and Grutter policies) are simply not present in a non-competitive K-12 transfer policy aimed at racial diversity." Pet. App. 25.

Where viewpoint diversity is the educational institution's goal, as in Grutter, 539 U.S. at 314-16, 337-38 (competitive, race-preferential law school admissions), and Gratz v. Bollinger, 539 U.S. 244, 253-57 (2003) (competitive, race-preferential university admissions), it makes sense to require an individualized, holistic assessment of candidates to determine how each may contribute to the overall educational or viewpoint diversity on campus. Lynn's interest, however, is not to achieve the benefits of viewpoint diversity, relevant to institutions of higher education or select exam schools, where educators seek to admit students with broadly diverse backgrounds, qualifications, and experiences to exchange perspectives and ideas and enrich the overall educational experience. Pet. App. 24-26, 184-85 n.90. Petitioners argue nevertheless that the First Circuit should have required Lynn to adopt a narrow tailoring requirement ("true educational diversity") unrelated to Lynn's achievement of its Plan's purpose. The First Circuit, however, correctly concluded that a student's background and qualifications apart from race are irrelevant to Lynn's achievement of the compelling educational benefits of racial integration and prevention of racial isolation and segregation in this K-12 educational context. Pet. App. 24-26 (citing Brewer v. West Irondequoit Central School District, 212 F.3d 738, 752 (2nd Cir. 2000) ("If reducing racial isolation is - -

standing alone - - a constitutionally permissible goal, . . . then there is no more effective means of achieving that goal than to base decisions on race.")). Pet. App. 25.

Moreover, Lynn's individualized review of transfer requests is consistent with Grutter and appropriate for this educational context and the interests Lynn advances. Lynn takes into account individualized, race-neutral factors, including a student's place of residence, school attendance zones, a sibling's school assignment, whether a "neutral transfer" applies, class size, space availability, and the student's language or special education needs before race is used as a decisive factor in a transfer decision. Pet. App. 6-8, 6 n.3, 125-28; Stipulations, ¶¶ 31, 36, 37, 42-43.

Additionally, the remaining assortment of complaints advanced by petitioners do not lead to the conclusion, singly or in combination, that the First Circuit misapplied the Court's holdings in Grutter or Gratz. Lynn's Plan is not a "flagging program."[9] Pet. Br. 21. Lynn's Plan does not insulate candidates from competition, in that, unlike in Gratz, Lynn's school transfers are not competitive or race-preferential, and Lynn does not seek to determine if applicants for school transfers would contribute to viewpoint diversity, because viewpoint diversity is not an interest Lynn advances in racially integrating its schools. Pet. App. 24-26, 184–85 n.90.

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[9] The petitioners contend that Lynn unconstitutionally employs a dual assignment system by "subject[ing] children of the disfavored race to a separate assignment process . . . ." Pet. Br. 21. On the contrary, the parties stipulated that Lynn's Plan has no "disfavored race," Stipulations, ¶ 106, and that "[s]tudents in all racial classifications . . . have the same school assignment rules applied to them . . . regardless of their race or ethnicity." Stipulations, ¶ 15.

Likewise, there is no merit to petitioners' repeated assertion that Lynn's use of race as a decisive factor in some transfer decisions reinforces racial stereotypes and causes Lynn's students to experience stigmatic harm. Pet. Br. 12-16. The petitioners' argument conflicts with the District Court's findings of fact and is unsupported by the record. Lynn's Plan, "by reducing racial isolation and increasing intergroup contact," has "ameliorated racial and ethnic tension and bred interracial tolerance."[10] Pet. App. 27; see also Pet. App. 19-22, 32, 100, 103, 134-36, 138-43, 176-77; Stipulations, ¶¶ 112-14, 116.[11]

This case is also distinguishable from affirmative action cases involving competitive admissions or distribution of a limited benefit where some form of preferential treatment of nonwhites, some might argue, may reinforce the stereotype that nonwhites cannot compete with whites on the basis of merit or that they need special governmental assistance to succeed. Pet. App. 25-27, 101, 184-85 n.90; Grutter, 539 U.S. at 317; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228-29 (1995); Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989).

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[10] Petitioners make certain allegations regarding two sisters, "Keana and Kearra," although their story does not appear in the record in this case. Pet. Br. 15. (Although petitioners suggest that Lynn designates students' race under its Plan, this is incorrect. Parents are responsible for identifying their child's race upon admission to the school system, not Lynn. See Stipulations, ¶¶ 39, 186, 190, 193, 196, 200, 203.)

[11] The petitioners' reliance on Johnson v. California, 125 S.Ct.1141 (2005), Pet. Br. 14, is also misplaced. As the First Circuit recognized, Johnson involved a state prison policy that imposed racial segregation, a practice long rejected in our country's jurisprudence. This case, on the other hand, involves racial integration in K-12 schools, long recognized since Brown v Board of Education as providing fundamentally important educational and citizenship benefits. Pet. App. 26-27.

2. The First Circuit correctly concluded that Lynn satisfies the requirements of settled law where it takes into account students' race no more than necessary to achieve the educational benefits its Plan is designed to produce and to prevent the educational harms of segregation, racial isolation, and racially identifiable schools.[12] See Grutter, 539 U.S. at 333, 335-36. Pet. App. 29-32, 119-24, 139-40, 144, 176-77, 184.[13] Moreover, the First Circuit did not find persuasive petitioners' argument, Pet. Br. 17, that Lynn's educational improvements are not attributable to racial diversity because all Lynn schools maintain positive educational conditions, even with varied racial compositions. Pet. App. 27 n.11; see also Pet. App. 143-44 n.55, 184-89; Stipulations, ¶ 48.

3. Additionally, the First Circuit correctly applied settled law to the facts presented in concluding that Lynn's administrators gave serious, good faith consideration to race-neutral alternatives and, consistent with Grutter, 539 U.S. at 339-40, determined that no workable or feasible alternative exists for Lynn to achieve the Plan's compelling goals without the

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[12] If Lynn's intent had just been to balance racially its schools, it would have eliminated its percentage ranges altogether and employed involuntary transfers to ensure that many of its schools had student populations as close as possible to 50% white and 50% nonwhite, or to ensure that each school's composition mirrored the racial composition of Lynn's aggregate school population.

[13] As the First Circuit correctly concluded, even though a few Lynn schools do not invariably maintain a "critical mass," or at least 20% of white and nonwhite children, students for all or the most substantial parts of their education attend schools with a critical mass. In those circumstances, students do not forfeit the long-term educational and race relations gains of integration when they then attend a school with a relatively short-term or marginal deviation from critical mass. Pet. App. 27 n.11; see also Pet. App. 143, 143-44 n.55, 184-90.

race-conscious means it currently employs, and without sacrificing its neighborhood-based school system and other important educational and practical objectives. Pet. App.33-34; see also Pet. App. 190; Grutter, 539 U.S. at 340 (in adopting alternatives, law school need not "effectively sacrifice all other educational values" or "a vital component of its educational mission"). Lynn "seriously considered, and plausibly rejected, a number of race-neutral alternatives," Pet. App. 33, including: (1) a strict neighborhood-based assignment plan without transfers; (2) a freedom of choice assignment plan; (3) a lottery-based assignment system; (4) a district assignment plan with magnets; (5) a socioeconomic-based assignment system; (6) a controlled choice plan (which may require involuntary transfers and forced busing); and (7) a redrawing of school attendance zones. As the First Circuit determined, none of these alternatives is feasible because of the segregative housing patterns in Lynn, the wide geographic separation between the predominantly white and minority sections of Lynn, and the persistent pattern of segregative school requests by Lynn parents. Pet. App. 33-34; see also Pet. App. 130, 130 n.41, 144-45, 190, 195-99, 200-01 n.101. Therefore, petitioners fail to advance any persuasive ground here for this Court's review of the First Circuit's application of settled law to these facts.

4. Finally, the First Circuit correctly applied settled law to the facts in concluding that Lynn satisfies the narrow tailoring requirement that a plan "be limited not only in scope, but also in time" by performing ongoing periodic reviews to determine whether its Plan is still necessary to maintain integration and prevent racial isolation and segregation. Pet. App. 32-33; Grutter, 539 U.S. at 341-42. Consistent with Grutter, the First Circuit concluded that Lynn regularly reviews the extensive data collected about every component of the Plan's operation, its schools, and its students, and

regularly analyzes its extensive data to determine the effect of terminating the Plan on school integration. Pet. App. 32-33; see also Pet. App. 129-30. The First Circuit also correctly observed that Lynn applies a built-in mechanism for limiting or ending its use of race, resulting, for example, in the Plan's restrictions not applying to Lynn's high schools since 1992. Pet. App. 32-33; see also Pet. App. 178; Stipulations, ¶ 16. Moreover, although it has not set a specific termination date, Lynn will limit the Plan's duration, as events warrant (demonstrated by Lynn's record of reducing its use of race-conscious components). See Pet. App. 32-33, 124-30, 178; see also Grutter, 539 U.S. at 342-43. Therefore, petitioners fail to present any persuasive ground here for this Court's review of the First Circuit's application of these facts to settled law.

CONCLUSION

For the reasons stated, this Court should deny the petition.

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